

Mobile Video Services, Ltd. and National Association of Broadcast Employees and Technicians, AFL-CIO. Case 5-CA-14249

1 August 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
JENKINS AND ZIMMERMAN**

On 25 January 1983 Administrative Law Judge Earldean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief and Respondent filed an answering brief.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,² and conclusions of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Mobile Video Services, Ltd., Washington, D.C., its officers, agents, successors, and assigns, shall take the action

¹ Respondent contends that the Charging Party's exceptions must be disregarded in their entirety because they fail to comply with Sec. 102.46(b) of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, in that they contain no page citations to the record. In its brief in support of exceptions, the Charging Party states that financial restraints prevented it from purchasing a copy of the hearing transcript and thus from giving page citations. Since there are matters raised in the exceptions which do not require page citations in order for us to evaluate the Charging Party's contentions, we do not disregard the exceptions in their entirety. However, the Charging Party should be advised that, as set forth in Sec. 102.48(c) of the Rules, the Board, when considering exceptions to factual findings, may limit its consideration to portions of the record specified in the exceptions and briefs. Here, the Charging Party's exceptions go to a great extent to the Administrative Law Judge's factual findings and rely in part on alleged inconsistencies in the testimony of witnesses credited by the Administrative Law Judge. In these circumstances, it would have been in the Charging Party's interest to have made a copy of the transcript available to itself, at the Regional Office, at least for inspection, so that it could point with some precision to the portions of the record in which the alleged inconsistencies occurred. We are confident that a national union like the Charging Party could obtain the services of someone located near the Regional Office to inspect the transcript even if, as was the case here, it has employed out-of-town counsel.

² The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT tell our employees they were demoted with an accompanying decrease in pay because of their union activities.

WE WILL NOT tell our employees that we are seeking an excuse to discharge them because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in the Act.

MOBILE VIDEO SERVICES, LTD.

DECISION

STATEMENT OF THE CASE

Earldean V. S. Robbins, Administrative Law Judge: This matter was heard before me in Washington, D.C., on September 20, 21, and 22, 1982. The charge was filed by National Association of Broadcast Employees and Technicians, AFL-CIO, herein called the Union, and served on Mobile Video Services, Ltd., herein called Respondent or MVS, on April 12, 1982. The complaint which issued on May 28, 1982, alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. The basic issue herein is whether Respondent discharged employee Patrick Anderson and discriminated against, and subsequently discharged, employee Tammas Hamilton

because of their union, or other protected concerted, activities.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a New York corporation with an office and place of business in Washington, D.C., herein called Respondent's facility, has been engaged at said facility in the production of television programs, including news programs. During the 12 months ending on March 31, 1982, in the course and conduct of said business operations, Respondent sold and shipped products and services valued in excess of \$50,000 directly to points located outside the District of Columbia and, during the same period, its gross volume of business exceeded \$100,000.

The complaint alleges, Respondent admits, and I find that Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is engaged at its facility in Washington, D.C., in the production of video tape and television programming, primarily news coverage, for its clients. Respondent's operations in Washington commenced in November 1978.¹ Cable News Network commenced operations in Washington in April 1980 and went on the air June 1, 1980. Since about June 1980, 80 to 90 percent of Respondent's business has been on a contract basis with Cable News Network, herein called CNN.² Prior to April 1980, Respondent had six employees in the classification of cameramen,³ tape operators,⁴ and editors. Generally, one cameraman and one tape operator constitute a camera crew; however, a crew may be enlarged depending upon the complexity of the assignment.

Since June 1980, Respondent has employed at its Washington facility approximately 27 or 28 employees with about 25 employees working on the CNN contract and 2 to 3 working for other clients. Respondent's CNN operation requires, in addition to the camera crews who

do the fieldwork, master controllers. These master controllers work at the master control facility located in the CNN building.⁵ They are responsible for the direction of the various shows, for the technical product, the signal, recording tapes, playing tapes to air, and taking in signals from the field, such as from a microwave truck or a telephone facility.

Respondent's chief executive officer is its president, Sheldon Levy, who is responsible for Respondent's overall operation and specifically for administering the CNN contract. Respondent's vice president, Lawrence Vander-Veen, is responsible for Respondent's operations as it relates to its other clients, which portion of the operation is commonly referred to as the production side. Respondent also employs one additional supervisor whose title varies from time to time. At the times material herein, this supervisor was Vito Maggiolo, the director of services.

Pursuant to a petition filed with the National Labor Relations Board, herein called the Board, an election was conducted at Respondent's facility on September 29 and October 6, 1980. A majority of the eligible employees voting therein voted for no union representation. The Union filed objections to the election and thereafter, on August 6, 1981, the first election was set aside and a second election directed. A second election was held on September 29, 1981, at which time the Union received a majority of the votes cast. Respondent's objections to the second election were overruled and, in January 1982, the Union was certified as the bargaining representative of Respondent's employees. Subsequently, in late June 1982, Respondent and the Union concluded a collective-bargaining agreement effective as of July 5, 1982.

B. The Discharge of Patrick Anderson

1. Facts

Anderson was hired by Respondent as an electronic news-gathering (ENG) cameraman on May 1, 1980. He had no prior experience as a cameraman but had been employed at a local television station as a tape operator in a unit represented by another union. According to Anderson, at the time he was hired Levy asked him his views on unions. Anderson replied that he was opposed to a union, that he was excited about working for Respondent because it was nonunion, and he felt that would give him an opportunity to grow within the industry. Anderson further said he felt he had been stifled or stymied in his previous employment because of the union structure.

During the preelection campaign preceding the first election, according to Anderson, Levy asked him several times about his views on the Union, how people were voting and how people felt towards the Union. Anderson told him he was still opposed to the Union and felt they had not been working for CNN long enough or the group had not been together long enough to warrant a

¹ Prior to that time, Respondent had operated in New York City. The New York office was closed in August or September 1980.

² CNN commenced operations in Washington in April 1980 and went on the air June 1, 1980.

³ A cameraman operates a portable field electronic camera commonly called a "mini-cam."

⁴ A tape operator carries the video tape recording equipment, a small box into which the camera is plugged.

⁵ The CNN building is across an alleyway from the MVS building. Much of the nonfieldwork performed by Respondent's employees is performed at the CNN building. Unless otherwise indicated, the term "Respondent's facility" will encompass both the CNN building and the MVS building.

union. Anderson also testified that prior to the first election he heard Levy make remarks that the NABET "scum-bags" were "this and that" and that Jim Wilson was trying to meet with the unit employees to organize them. He also asked Anderson if he ever had any contact with Wilson. Anderson also testified that, prior to the second election, Levy made comments regarding the Union, and that prior to the night of the debate Levy mentioned that he was going to meet with "scum-bags" from NABET. Other employees were present.

At the time of the first election, Anderson was assigned to work for CNN, an assignment he continued until approximately November 1980 at which time he was assigned as cameraman on the production side. According to Anderson, a production side assignment was considered a choice assignment because the work load was considerably lighter, generally with set hours and holidays and weekends off on a regular basis.

On March 16, 1981, Anderson went on sick leave during which time he had knee surgery. When he returned to work in July 1981, his physical condition was such that he could not work on a mini-cam crew, so Respondent gave him a schedule whereby he worked in master control 3 days a week and in production 2 days a week. On the days he worked in production he was basically a floater doing whatever was required, filling in on both the CNN and the production sides. Anderson worked in master control for 6 or 7 weeks. The first 2 weeks he worked varied shifts. Thereafter he worked on the early morning shift which began at 5 a.m. for probably 3 weeks and on the late shift for 2 weeks or more. At some point, probably in late August, he was reassigned to the production side.⁶

The second election was on Monday, September 28, 1981.⁷ On the Thursday evening prior to the second election, Levy and Jim Wilson, the union representative, had a debate in the conference room at Respondent's facility. After the debate, Wilson asked Anderson if he would be the union observer during the election. According to Anderson, he was somewhat surprised and said he would have to think about it. About 10 or 15 minutes later, he told Levy that Wilson had asked him to be the union observer, and asked Levy exactly what that was and how Levy felt about him being the observer. According to Anderson, Levy said it would not be in Anderson's best interest as to his company standing to be the union observer. He further said it would hurt Larry VanderVeen personally if Anderson were the union observer.⁸ Anderson voted in the second election; however, he did not serve as union observer nor did he have any further discussions with Levy regarding serving.⁹

⁶ Levy testified that, despite his feeling that Anderson should not be reassigned to production because of the falsification of time records, he acquiesced in VanderVeen's desire for this reassignment.

⁷ Hereafter all dates in sec. B herein will be in 1981 unless otherwise indicated.

⁸ Levy admits that he reminded Anderson of his close relationship with VanderVeen.

⁹ There is no evidence of any discrimination against, or coercion of, the employee who did serve as the union observer. He received a promotion after the election and is still in Respondent's employ.

During the week following the second election, Respondent posted a schedule change which indicated that Anderson was being transferred to the CNN side. Later that day, Anderson saw Levy in the hallway and asked why he was being transferred. According to Anderson, Levy said because they no longer needed a production cameraman. An hour or two later, Anderson again asked Levy why he was being transferred from production. Levy asked him to come into his office and shut the door. According to Anderson, Levy then said, "VanderVeen is a weird guy; I've been working with him for three, for four years, and sometimes I don't even understand the things that he does and sometimes I can't even talk to the guy. Larry was very personally hurt that you voted for the union on this issue, and that you didn't support the management side on this particular issue." Levy further said, according to Anderson, that he and VanderVeen did not feel they could have someone working as close as Anderson to management who was not in agreement on the union issue. Levy also said he knew Anderson had voted for the Union. Anderson asked how he knew. Levy said he could just tell and that he felt they could not have anyone as close to management working on the production side who did not agree with them on this particular issue.

On October 7, Levy sent Anderson a memo, the body of which reads:

As per our discussion concerning your salary adjustment, we find that we cannot return you to a level of pay to which you were placed at in error.

Our original plan to increase you back to the amount in error was based on your going back into the production department.

Since we have had to remove you from that position due to 2 (two) recent major errors in judgement on your part, we feel that you are being quite adequately compensated in your new position.

You will of course receive the normal six month reviews and salary adjustments if warranted.

Within the next 2 weeks thereafter, Anderson made two written requests that Levy specify in writing what the "two recent major errors in judgement" were.

Anderson testified that he owns a NABET jacket which he wore to work probably twice, the first time being in early November when he was working on the CNN side. No one from Respondent ever spoke to him directly about wearing the jacket. However, the day after he wore the jacket he walked over to MVS to speak to someone regarding a problem he was having. No one was at the reception desk so he proceeded to walk down the hallway, and as he got about halfway down the hallway, less than 20 or 25 feet from the conference room, he saw employees Roger Sullivan and Dick Colby, Maggiolo, and, he thinks, VanderVeen, in the conference room. He did not see Levy. However, he heard Levy say, "We've got to find a way to get Anderson to quit wearing that f—g NABET jacket." He further heard Levy say, "It's just like a client can ask us to have our employees not wear Mobile Video T-shirts on a

particular job." At this point, Anderson left the building. He wore the jacket only once after this.

Both Maggiolo and Levy deny that Levy said they had to find a way to get Anderson to cease wearing the NABET jacket. According to Maggiolo, a job-related discussion was in progress when Jim Rutledge, CNN's senior assignment editor and envoy from CNN's Atlanta headquarters, appearing very agitated, burst into the conference room and said, "We've got to get this guy to stop wearing this jacket." At some point either immediately prior to or immediately after this statement, Rutledge said something to indicate that he was referring to Anderson's NABET jacket. According to Maggiolo's testimony on direct examination, Levy said there was nothing that could be done and Rutledge left.¹⁰ On cross-examination, Maggiolo testified that, in a manner which was characteristic of him, Rutledge stormed in, made his statement, and stormed out before receiving any response. After Rutledge's departure, there was some discussion between Levy and Maggiolo, and perhaps VanderVeen.¹¹ They agreed that, if an employee was wearing reasonable dress, a client was not justified in requesting that a particular item of clothing not be worn.¹²

Levy testified, in substantial agreement with Maggiolo, that Rutledge burst into the room, made his demand, and immediately left. He also does not recall whether Rutledge remained in the room long enough to hear Levy's response which was that he was not sure they could do anything about it. After Rutledge left, there was some discussion to the effect that there was nothing that could be done with regard to the wearing of the jacket. Levy mentioned that Respondent has no dress code and that only once in its history had Respondent requested an employee not to wear a particular item of clothing which was in response to a White House request not to wear shorts. Levy further testified that several days prior thereto he had seen another employee, Phil Geyelin, wearing a NABET jacket.¹³

On November 9, according to Anderson, he telephoned the assignment desk from the field to inquire if he had any further assignment. At that time, he was told to return to the facility to see Levy, which he did. Anderson testified that, when he walked into the office, Levy, VanderVeen, Maggiolo, and Ossie Carson, an MVS employee, were present. Levy said, "You wanted to talk about the reason you were removed from the production department." Levy then proceeded to state that there were two major reasons, that Anderson had two recent major errors in judgment. On one occasion, Levy said, Anderson left the transmitter out of the van when he was out on assignment. Also, said Levy, Anderson's

performance during the solidarity day shoot was not "up to snuff." Anderson replied that he did in fact go out of the parking lot without the transmitter in the van but after he had gone about a block or two down the street, realized it was not in the van, returned and picked it up.¹⁴ Anderson described what his problems were on solidarity day. He told Levy he was not familiar with the situation as to that particular job, that no one from MVS had ever attempted a job of that size before, and that he did not feel the job was his fault because the problem was in engineering and he is not an engineer.¹⁵

Levy then said there was also a third reason, that on another occasion Anderson left the building on assignment without the transmitter. Anderson said that particular incident occurred the day after he had been transferred to CNN from production so he did not understand how that could affect his transfer. At this point, according to Anderson, Levy asked if Anderson had ever falsified company records. Anderson replied, not to the best of his knowledge. Levy asked, "Have you ever come in late to work." Anderson replied, "I may have but not to the best of my knowledge." Levy asked if Anderson was consistently coming in late. Anderson said, "No comment." Levy made some response about a scandal on the master control early shift, but Anderson does not recall exactly what he said. Levy did ask if Anderson came in late when he was working in master control. Anderson said he had been in late possibly a few times. Levy did not mention the tardiness of any other employees in master control. Someone said they would decide what to do with Anderson later in the week. Anderson testified that the last thing he said before he left was, "I have no further comment."¹⁶

This conversation occurred at the end of Anderson's workday. The next 2 days were his off days. On the evening of November 11, his second day off, he telephoned CNN to ascertain his reporting time for the following day. Someone on the assignment desk gave him his reporting time but said he was to report to Maggiolo before he went into the field. The following day on reporting for work, Anderson spoke with Maggiolo in Maggiolo's office in the MVS facility. No one else was present. According to Anderson, he inquired as to what Maggiolo wanted. Maggiolo said, "The powers that be have informed me that you have two choices, or two options, regarding the discussion on Tuesday about the lateness. And Mobile Video has decided they will accept

¹⁰ CNN employees are unrepresented.

¹¹ Maggiolo is unsure as to whether VanderVeen left the room sometime after Rutledge left.

¹² Maggiolo testified that he has no knowledge of any complaints by clients as to employees wearing Mobile Video T-shirts. Employees have worn these T-shirts on CNN assignments. He does not recall any comparison being made in the discussion to the wearing of Mobile Video T-shirts.

¹³ Geyelin remained in Respondent's employ until June 1982 when he resigned for a better position. Anderson also testified that Geyelin wore a NABET jacket. Maggiolo testified that he later saw some unnamed employees wearing NABET jackets.

¹⁴ According to Anderson, this occurred in late August or early September within 2 or 3 days of his reassignment to production, perhaps even the first day. According to him, they were going to do a test microwave shot to see if it was feasible to do microwave transmissions from a certain location. He lost about 5 minutes returning for the transmitter and he received no memo regarding this back in August when it happened, nor did anyone tell him he had done anything wrong.

¹⁵ According to Anderson, there had been no previous complaint made to him regarding his performance on Solidarity Day.

¹⁶ Anderson testified that at the time of this discussion he knew that the other master controllers had had discussions with management, that one of the master controllers had resigned, and there was this feeling that Respondent was going to unload on anyone that had been late in master control. Nothing was said in the meeting about discharging Anderson. However, when he was told they would let him know what they were going to do later in the week, he assumed that meant disciplinary action.

your resignation and you will be able to work at Mobile Video or CNN until the end of the week. And, if you don't resign, you will be fired on the spot and we will prosecute you for backpay for the days that you came in late and cheated on your records." Anderson said, "I'd like to have 24 hours to think about it to make a decision whether I want to resign or be terminated." Maggiolo said okay. Anderson worked for the remainder of his shift on a CNN camera crew.

Maggiolo testified in substantial agreement with Anderson as to this conversation except his account includes no mention of possible prosecution for backpay or 24 hours. According to him, Anderson said he wanted to think about it and Maggiolo said he had to have an answer relatively quickly.

Anderson testified that, at the end of his shift that evening as he was putting his equipment away in the CNN facility, Maggiolo came up to him and asked what his response was to the earlier discussion. Anderson reminded him that he had 24 hours to think about it. Maggiolo said, "Levy has changed that; he wants to know right now." Anderson said he could not tell him right then because they had agreed earlier that he would have 24 hours to reach a decision. Maggiolo agrees that he had a further conversation with Anderson in this regard later in the evening. According to him, the conversation took place in his office. He told Anderson he needed a decision. Anderson said he needed more time. Maggiolo said his instructions were to get an answer. Anderson said he was not going to resign.

Shortly thereafter, as Anderson was leaving the MVS facility, he saw Maggiolo on the street outside the facility. According to Anderson, he told Maggiolo he was disappointed at everything that was happening. Maggiolo said he did not think it was fair. He felt that Anderson was being cited and he felt Anderson was getting it because of his activities with the Union and the whole union thing. Maggiolo said he was sorry, that he was sorry if it affected their friendship. He said he hoped they would still be friends, but that he felt he had to do it, that this was the first time in his life he had a job where he felt he had any kind of security and was making some decent money so he had to do what the employer told him to do. He again reiterated that he hoped it would not affect their friendship. Anderson said if he saw Maggiolo walking down the street he would not cross the street, or if he saw him in a bar he would not ignore or avoid him, but it probably would affect their friendship in some way.

When Anderson reported to work the next morning, again he was told to meet with Maggiolo before he went out on assignment. According to Anderson, he went to Maggiolo's office. Maggiolo asked if he had made up his mind. Anderson said, yes, but he was going to have to be terminated because he did not feel he should resign. Maggiolo said he was sorry and that Anderson was terminated. However, he asked if Anderson could work that day because they did not have anyone to fill his spot. According to Anderson, he agreed to do so and did, in fact, work that day. Maggiolo admits that Anderson could have given him his decision that next morning

but testified that his recollection is that Anderson gave his decision the evening of November 12.

Maggiolo agrees that he had a third conversation with Anderson that day. According to him, he told Anderson that he was sorry to see him go, that he was hurt and felt that things had not gone as well as they should have. Maggiolo further mentioned that, before Anderson commenced working for Respondent, he had tried to warn him that Levy was a difficult person to work for in some respects, that situations like this could often happen at MVS. Anderson indicated that he was angry and hurt, and said that in terms of his friendship with Maggiolo obviously there would be some difference but he would not walk on the other side of the street if he saw Maggiolo coming. Maggiolo said it was unfortunate that Anderson had left himself open for this kind of disciplinary action. Maggiolo testified that he has no further recollection of the conversation. He does not specifically deny the statements attributed to him by Anderson.

Levy testified that Anderson was discharged because he falsified his timesheets during the period he was on the early master control shift and refused to admit that he had done so. Such falsification was in violation of rule 6 of the employee handbook, which reads:

A SINGLE VIOLATION INVOLVING ANY OF THE FOLLOWING PROHIBITED ACTIVITIES MAY RESULT IN AN EMPLOYEE'S IMMEDIATE DISCHARGE

* * * * *

6. Altering, falsifying, or making a willful misstatement of fact on any Company job or work record, employment application, chart, report or form.

According to Levy, in around late June or early July, Jeffrey Smith, one of the senior master controllers who had just been assigned to the early morning shift, informed him that there was a practice in effect on the early morning shift of only one person coming in at 5 a.m. for the beginning of the shift and everyone else assigned to that shift coming to work between 5:30 and 6 a.m. Thereafter, Levy and VanderVeen began coming to work prior to 5 a.m., on an irregular basis, to observe the time of arrival of the early shift master controllers. This continued during July and August and more infrequently during September. Anderson was among the master controllers who reported to work late on occasion. During this period, nothing was said to any of these employees regarding their tardiness. However, one morning prior to September 5, three of the master controllers who reported to work late did observe VanderVeen watching the office. Nevertheless the practice continued.

According to Levy, on October 7, the day after the assassination of Anwar Sadat, someone from CNN reported to Maggiolo that they had planned to transmit a communication to Atlanta at precisely 5 a.m. that morning;¹⁷ however, no master controllers reported for duty

¹⁷ Levy does not recall who from CNN spoke to Maggiolo and Maggiolo was not questioned in this regard. A formal written complaint was not received from CNN until November 10. Levy testified that such a

Continued

until after 5:30 a.m. According to Levy, they had been procrastinating as to taking any action with regard to this situation because they were fearful that any disciplinary action would result in objections to the election, but, upon CNN becoming aware of the situation, they felt that something should be done. However, the period following Sadat's assassination was a very busy time for Respondent and CNN, so no action was taken until early November. On November 4, they still had not decided what disciplinary action should be imposed against individual employees but had determined that the matter would have to be resolved shortly, that in the meantime a notice would be posted and that they would have to stop procrastinating and decide on a course of disciplinary action.¹⁸

As a result of this decision, a notice signed by Levy and addressed to "All MVS Employees" was posted on November 4, the body of which reads:

It has come to my attention that there are certain deliberate inaccuracies appearing regularly on various people's time and expense sheets.

This practice shall cease and desist immediately.

Any further incidents of this type shall result in dismissal and prosecution.

Later that day or the following day, employee Torgunn Blix went to Levy's office and told him that with regard to the posted memo she assumed he was referring to employees on the morning control shift and she wanted to tell him she had been one of the people whose timesheets had not been accurate. Levy called Maggiolo in and they questioned Blix with regard to the practice. She answered all their questions and told them who had been involved. She was told they had not made any decision as to what action to take, and was requested to write a memo with regard to the matter for Respondent's files.

Later that day, Blix gave Levy a memo dated November 4, the body of which reads:

In regards to your November 4, 1981 memo about falsification of time sheets, I want to admit that during my stint on the morning shift I falsified my time sheets. I realize my error in thinking that it was acceptable to arrive a little late for that very early shift. I will not be late again.

Levy testified that he and VanderVeen decided that, since Blix had brought the matter into the open and that very likely the entire staff was now aware of the situation, they had to reach a decision as to disciplinary action. They decided to give some thought over the

delay was not unusual. According to him, it is the nature of the business to have spurts of being very busy and, when it quiets down, everyone tries to catch up on paperwork. In support thereof, Respondent submitted evidence of similar delay in complaints on other occasions.

¹⁸ Levy initially testified that the posting of the notice was prompted by a memo from CNN and that he could not recall whether Jerry Levin, CNN Washington bureau chief, had spoken to him earlier regarding this matter or whether the November 10 memo from Levin was the memo which prompted the posting. Levy's November 9 and 10 conversations with the master controllers indicate that he was aware at that time of the October 7 incident.

weekend as to what to do and, on Monday, November 9, determined that they would interview the employees involved in the time falsification scheme.

On November 9 and 10, Anderson and employees Mike Rosenfelder and Kevin Culbertson were interviewed separately. All three of them initially admitted only that they had been late for a few minutes on an irregular basis. After Levy informed them in some detail as to the extent of his awareness of what had been going on, Rosenfelder and Culbertson both admitted that there had been a practice of only one master controller coming in on time and the others coming in late. However, when Anderson was confronted with this information, his response was "No comment."¹⁹

On November 10, Rosenfelder gave a memo to Levy, the body of which reads:

I'm writing to formally apologize for the inaccurate time reports we discussed in your office yesterday. The practice that I and others followed, of coming in late every other day, grew out of group-psychology and the boredom of sitting in the bureau from five to six every morning with little to do. We convinced ourselves that we were still doing all the work we were being paid for. This is only an explanation of our thinking; there can be no justifying what I did. It was a bad habit I let myself fall into. It was discontinued some time before our meeting.

I can only ask now that I be allowed to continue working and that we agree on a method for me to pay you back for the undeserved overtime. I hope that the two years I worked for you prior to this summer will suggest that I'm capable of being an honest and productive member of the company. Thank you.

Levy testified that, either later on the day of, or the day following, his interview with Culbertson, Culbertson came in and asked Levy if he was going to be discharged. Levy said he was leaning towards discharging Culbertson. Culbertson said he would like an opportunity to resign and asked if Respondent would give him a good neutral recommendation if he did resign. Levy said, yes, if Culbertson chose to resign he would be given a satisfactory recommendation. Culbertson asked if Levy would put that in writing and Levy agreed to do so. Culbertson then asked if Levy had a form for resignation. Levy said, yes, and told Culbertson where to obtain the form. Shortly thereafter, Culbertson submitted his resignation to Levy in a memo dated November 11, the body of which reads:

¹⁹ Levy taped these conversations. During the course of the hearing herein, the General Counsel and the Charging Party objected to the admission of these tapes and/or a transcription thereof into evidence and I reserved ruling thereon. After the close of the hearing, the tapes were transcribed, the parties entered into a stipulation that the transcription is accurate, and both the General Counsel and the Charging Party withdrew their objections. The two tapes and the transcription thereof are hereby received into evidence as Resp. Exh. 7.

This is to notify you that effective *Nov. 14, 1981*, I hereby voluntarily resign my position as *Master Controller* with Mobile Video Services, Ltd. and have no desire to be rehired in any capacity at any time in the future.

Shortly thereafter, Levy instructed Maggiolo to make the same offer of a satisfactory recommendation to Anderson if he desired to resign and to inform Anderson that, if he chose not to resign, he would be discharged.

On November 11, Levy wrote a memo to Rosenfelder regarding "Falsification of Time Records," the body of which reads:

As you are well aware, your participation in an organized group that did not report for master control shifts at assigned times is now a matter of record. It is also a matter of record that this practice involved the falsification of your time sheets—indicating that you had arrived for work at 0500 when, in the majority of instances, this was not the case.

Your actions in this matter not only involve fraud and a betrayal of employer trust, but the anger of a client who feels, at the very least, cheated. The activities which you have acknowledged have very serious implications.

It is only your previous clean record and your seniority²⁰ with this company that have led us to not dismiss you. We will make a determination at a later date regarding the issue of restitution in this matter. This memo serves as a record of the company's stand on this matter, and is to serve as a warning to you.

Be advised that you are being put on six months probation as a result of your actions. As is the case with any probationary employee, any infraction of company policy can result in immediate dismissal. However, we stand firm in our hope that you have learned from your indiscretions and will maintain a clean slate in the future.

On that same day, Levy also wrote a memo to Blix regarding the same subject, the body of which reads:

This memo is in reference to your participation with a group of employees whose failure to report for work on time involved not only an organized effort to deceive this company, but the falsification of company time sheets.

As you well know, the consequences of your involvement, especially in the falsification of official time records, are serious and have far-reaching implications. Among other things, your actions constitute a betrayal of our trust in you as an employee. It is only due to the fact that you voluntarily came to us with a confession regarding your involvement that Mobile Video is not taking more severe action.

This memo serves as a warning to you regarding future behavior and is a record of the company's

action in this matter. You are being placed on six months probation as a result of your activities. As is the case with all probationary employees, any infraction of company rules or procedures may result in dismissal.

The body of Levy's November 11 memo to Culbertson reads:

As we discussed yesterday, should you choose to voluntarily resign your position as Master Controller with Mobile Video, I will see to it that satisfactory references will be provided, as needed, to any of your prospective employers.

Also, should you choose to submit your resignation, no action will be taken by this company to seek recovery of monies paid on the basis of falsified hours on your past time sheets.

Please advise me of your intentions as soon as possible. I believe it is in our mutual best interest to resolve this matter as quickly and as amicably as possible.

2. Conclusions

The General Counsel and the Charging Party argue that Respondent's purported reason for discharging Anderson is pretextual and that he was, in fact, discharged because of his union activities. Specifically the General Counsel contends that the punishment was excessive for the misconduct and that Anderson received disparate treatment inasmuch as Blix and Rosenfelder were not discharged even though their conduct was more culpable; and that statements by Levy and Maggiolo are indicia of illegal motivation. In support of the contention that the punishment was excessive, the General Counsel argues that Respondent clearly did not consider the misconduct as very serious in view of the delay of several months before either stopping the practice or disciplining employees therefor; the limiting of Rosenfelder's required restitution to the loss of only 2 days of personal leave; and the offer to Blix, which she declined, of the position of director of services in June 1982.

I find the latter two reasons unpersuasive. Contrary to the urgings of the General Counsel, I draw no adverse inference from the fact that Respondent did not demand hour-for-hour restitution for Rosenfelder's lost time or from the fact that Blix was offered the position of director of services shortly after the conclusion of her 6-months probation. Further, although the delay in dealing with the problem is somewhat suspicious, Levy's testimony that the failure to act was motivated by fear of objections to a second election is not so unreasonable as to require an inference that the asserted reason for the discharge was pretextual.

This is particularly true since Anderson's union activity was minimal and not different in kind from that of other employees. Thus, the only evidence of his union activity was the wearing of the NABET jacket. However, admittedly, Anderson wore the jacket only once or twice, both times after the election, and other employees also wore NABET jackets. Yet there is no evidence of discrimination against these other employees. Further-

²⁰ Levy testified that Rosenfelder began his employment with Respondent about 2 months after Respondent commenced operations in Washington.

more, regardless of whether the statement overheard by Anderson with regard to the jacket was made by Rutledge or by Levy, the essence of the comment was that Anderson should cease wearing the jacket, not that he should be discharged because he wore it.

I am similarly unpersuaded by the argument as to disparate treatment. The contention that Anderson is less culpable because of the relatively short duration of his assignment as a master controller lacks merit. He falsified his time records throughout the period of his assignment and the other controllers involved falsified their time records throughout the period of their assignment or the duration of the arrangement, whichever was shorter. The fact that one worked fewer days as a master controller than the other does not render him any less culpable.

Although all the employees involved were disciplined, it is undisputed that there was disparity in the discipline imposed. Thus Blix, who voluntarily revealed her misconduct, was placed on probation only; Rosenfelder, one of the most senior employees who, when confronted with Respondent's knowledge of the arrangement, admitted his conduct, apologized and voluntarily offered to make restitution, was placed on probation and docked 2 days' leave; Culbertson, who—when confronted with Respondent's knowledge of the arrangement—admitted his misconduct and requested an opportunity to resign rather than face the possibility of discharge, was discharged; and Anderson, who—when confronted with Respondent's knowledge of the arrangement—refused to respond other than to state, "No comment," was discharged. Thus, there is some rationality behind the imposition of different disciplinary action. I also note that at least one other employee had previously been discharged for falsifying records.²¹ In the circumstance, I find that the difference in discipline imposed, coupled with the timing and Anderson's minimal union activity, is insufficient to establish that the asserted reason for Anderson's discharge was pretextual.

The General Counsel and the Charging Party argue, however, that Respondent's unlawful motivation is clear when viewed in the light of Anderson's conversation with Levy several days before the election regarding the Union's request that Anderson serve as the Union's observer at the election, his conversation with Levy several days after the election regarding the reason for his transfer out of production, and his post-discharge conversation with Maggiolo during which Maggiolo allegedly stated that he felt Anderson was being discharged because of his union activities. In the absence of any significant union activity by Anderson prior to the election, I find that the observer conversation is not persuasive indicia of unlawful motivation²² even though Levy's admitted response to Anderson's query as to how Levy felt about Anderson being an observer was to remind Anderson of his close relationship with VanderVeen.²³ In this

regard, I note that Anderson did not serve as observer and that the employee who did act as union observer was promoted following the election and remains in Respondent's employ.

Further, I do not credit Anderson as to the alleged conversation with Levy regarding Anderson's transfer out of production. I find it incredible that Levy would have admitted an unlawful reason at this point when he had the presence of mind to assert lawful reasons for the transfer both earlier that day and again several days later. This is particularly true since his experiences during the preelection campaigns had alerted him to the possible adverse legal consequences of such conduct.

As to the alleged statements made by Maggiolo, in view of my other credibility findings, I do not credit Anderson in this regard. However, even assuming *arguendo* that Maggiolo made the statements attributed to him by Anderson, I find they are not persuasive indicia of unlawful motivation since the Maggiolo statements were labeled as Maggiolo's opinion and Maggiolo creditably testified that he did not participate in the decision to discharge Anderson and had never discussed Anderson's union activities with Levy.

In all the circumstances, I find that, even though the General Counsel made out a bare *prima facie* case, Respondent has established, to an extent sufficient to shift the burden to the General Counsel, that Anderson would have been discharged even if he had not engaged in union activities and that the General Counsel has failed to meet this burden. Accordingly, I find that Respondent has not violated Section 8(a)(3) and (1) of the Act by discharging Anderson. Further, in view of my credibility findings, I find that Respondent has not violated Section 8(a)(1) of the Act, as alleged in subparagraph 5(a) of the complaint; and, as no evidence was adduced in support thereof, has not violated Section 8(a)(1) of the Act as alleged in subparagraph 5(a) of the Act.

C. The Discharge of Tammias Hamilton

1. Facts

Hamilton began work for Mobile Video as an ENG tape operator on December 9, 1980. As such, she was part of a camera crew and was responsible for operating the tape deck. According to Hamilton, during a conversation with Levy and VanderVeen on her first day of employment she was told that Respondent was a non-union shop but nothing was mentioned about a union election.²⁴ Sometime during April 1981, Hamilton was promoted to cameraman on the mini-11 camera crew. During July, August, and September, three or four union meetings were held at Hamilton's home, announcements as to which were posted on the bulletin board in the CNN building where MVS notices pertaining to employ-

²¹ Roger Fromm, for falsifying expense records.

²² This conclusion would be unchanged even if I credited Anderson's testimony that Levy also said that acting as union observer would not be in Anderson's best interest. The statement that Levy admits making is essentially to the same effect.

²³ Contrary to the General Counsel, I do not conclude that Levy must have assumed some union activity on Anderson's part simply because Anderson was requested to serve as union observer. Levy could have

just as easily assumed that union support was low since it was forced to seek a nonactivist to act as its observer.

²⁴ Immediately prior to her employment with Respondent, Hamilton had worked for CNN in Atlanta doing fieldwork in terms of audio and camera work, editing, writing, commercials, transfers, et cetera. At the time she left the employ of CNN, she was a tape operator. Prior to that, she was employed by a network whose employees were known by Respondent to have been represented by NABET.

ees are posted.²⁵ During this same period, in addition to serving as recorder for the union meetings held at her home, Hamilton also distributed to employees union membership application forms and dues authorization forms.

On November 12, Levin transmitted to Levy several complaints, mostly from Lee Young, the CNN director of operations, whose position was comparable to that of Maggiolo. One of these complaints involved Hamilton. The memo in this regard reads:

TO: JERRY LEVIN
FROM: Lee Young
DATE: 10-26-81
SUBJECT: Mini 11 performance

This is to report on the performance of the Mobile Video crew that worked at Yorktown. Their attitude was absolutely pitiful. Their obstinance, lack of drive and unwillingness to do anything other than the bare minimum was a severe handicap to our efforts in Yorktown. This contrasted sharply with the performance of the Atlanta crew (Jim Hatter & Zoe) whose hustle and energetic professionalism made the day on more than one occasion. Tamas [sic] became so uncooperative at one point that she was ordered off camera in the middle of a live shot. This type of attitude is not to the benefit of CNN or Mobile Video.

Later that day Levy gave Hamilton a written warning, the body of which reads:

I just received a copy of Lee Young's memo to Jerry Levin, dated October 26, 1981, regarding your performance during CNN's Yorktown coverage.

I find your behavior on this assignment thoroughly unprofessional and far below the standards Mobile Video expects of its employees. What is even more disturbing to me is the fact that this is not the first occasion that your out-of-town work efforts have resulted in reports of lack of cooperation and substandard efforts.

Since you obviously have difficulty responding in a professional manner to the rigors of out-of-town assignments, you will no longer be scheduled for them. Furthermore, unless there is immediate improvement in the quality of your camera work, we may have to consider reassigning you to the position of tape operator.

Please be advised that this memo constitutes an official warning regarding your job performance. Failure to upgrade your work product, not to mention your attitude and your attendance record, may well result in serious disciplinary action.

²⁵ According to Hamilton, on the same day she posted the notice as to the union meeting on the employee bulletin board, a notice to all MVS employees dated October 5, 1981, and signed by Maggiolo appeared on the bulletin board, stating that all notices are to be placed on the bulletin board rather than on walls or other surfaces and that, in accordance with the employee manual, postings on the bulletin board should be cleared first with Maggiolo.

On November 13, Wendy Walker, a CNN producer on the Yorktown assignment, wrote a memo to Levin which was generally complimentary of Hamilton's performance, but admits that Hamilton was taken off the camera and attributes the problem to Hamilton being a perfectionist whose inquiries as to what was going on were not appreciated.

By memo dated December 7, 1981, Maggiolo informed Hamilton and employees George McCargar and Ken Williams that, due to the need to provide two fully credentialed crews daily at the White House, Respondent was temporarily reshuffling personnel and assigning McCargar to the mini-11 crew and placing Williams in McCargar's master control schedule. The memo further stated that due to McCargar's seniority he would be the crew chief on mini-11. As a result of this reshuffle, McCargar worked as cameraman and Hamilton as tape operator on the mini-11 crew.

Levy testified that, just prior to the temporary assignment of George McCargar as cameraman on the mini-11 crew, the White House had announced that, because of the reports of the Libyan hit squads in the country in an attempt to assassinate the President, the White House had announced that they were tightening security for persons with access to the White House, that they were going to make it difficult for persons who did not possess permanent White House credentials to go in and out of the White House covering news. CNN therefore instructed Respondent to provide as many fully credentialed crews as they could because it is usually a 3- to 6-month process to get someone credentialed. McCargar held a permanent White House pass but had temporarily been assigned to master control on a trial basis, and Ken Williams, who did not have a permanent White House pass, had been temporarily placed in the field. According to Levy, he therefore considered that the most expeditious thing to do was to make a switch, placing Hamilton with McCargar since they both had White House passes. McCargar, who had been employed as a cameraman for Respondent since April 1980, had more camera experience than Hamilton.

This reassignment did not result in any immediate change in pay for Hamilton. However, on or about December 31, Hamilton inquired of Levy why she had not received a pay raise since she had been working for Respondent for a year. Levy said Maggiolo would have to handle that. Levy also said, according to Hamilton, that McCargar would be shooting on a permanent basis at this point because CNN had complained regarding Hamilton's camera work. Hamilton said she had gotten a number of very good recommendations from reporters and the people that she worked with at CNN and asked what was the complaint. Levy said it was regarding a shoot in Yorktown. Hamilton said she did not understand why. Levy said that was what CNN had decided, so he had decided that she would no longer shoot the camera.

Levy did not specifically testify as to a December 31 conversation with Hamilton regarding the permanent reassignment. However, he did testify that it was Respondent's policy that an appropriate change in salary, either upward or downward, would accompany a change in

employee classification. In this regard, on December 10, 1980, another employee, John Quinn, received a decrease in salary when he was reassigned, over his objections, from cameraman to tape operator. Also, employee Marty Berman, in 1980, was reassigned from the position of courier to tape operator at a lower rate of pay. Levy testified that, on or around January 1, Maggiolo brought him Hamilton's personnel file. They reviewed the file and discussed her salary adjustment and decided that she would be made the tape operator permanently on mini-11. At that time they agreed that her performance was on the "needs improvement" level which carried a \$500 raise.²⁶

Maggiolo, who was on vacation on December 31, returned to work around the beginning of January. On or about January 5, Hamilton telephoned him and inquired as to her pay raise. Maggiolo said he wanted to speak to her in person but, upon her insistence, said that Hamilton would receive a \$1,000 reduction in pay and a \$500 raise which would result to a net reduction in pay of \$500 per year. According to Hamilton, she asked if this was because of her union activities and the meetings at her house. Maggiolo said yes. Hamilton said McCargar had related to her a conversation he had with Maggiolo a couple of weeks previously wherein they had discussed Hamilton's union activity. She asked if it was the union activity and Maggiolo said yes. Hamilton said, according to McCargar, he and Maggiolo had discussed the fact that Hamilton was on a hit list and should start looking for another job. Maggiolo replied that he thought Hamilton should start looking for another job. He said the reason Hamilton was on the hit list was because of the union meetings at her house and that Levy was looking for an excuse to discharge her.

Maggiolo does not specifically deny the telephone conversation with Hamilton. However, he testified that he did conduct a salary review with her in his office at which time he told her she had gotten a \$500 salary increase, but because she had been taken off camera and put in a position of a sound technician there was a decrease of \$1,000 because of her change in classification and therefore her net salary adjustment was a decrease of \$500.

Maggiolo further testified that a series of salary reviews took place at or about the same time as Hamilton's. In each instance, Levy made the decision as to the amount of the salary adjustment.²⁷ Levy informed Maggiolo what Hamilton's salary adjustment would be and instructed him to convey this information to her. According to Maggiolo, when he told Hamilton that she would be receiving a net decrease in pay, she stated in no uncertain terms that she was unhappy about this action, to which Maggiolo responded that there was not going to be any change in the decision. He does not

recall if she responded to that. However, Maggiolo admits there may have been some further exchange between them but he does not recall what it was.

Maggiolo also admits that he probably had some later conversations with Hamilton regarding the decrease in her pay but he does not recall the substance of any of these conversations. He does not deny the statements attributed to him by Hamilton with regard to her union activities. He does deny that he ever had any conversation with Levy concerning Hamilton's union activities. I credit Maggiolo as to this denial. I found him to be an honest, forthright witness who appeared to be endeavoring to tell the truth to the best of his recollection.

On January 16, 1982, McCargar and Hamilton were assigned to the press conference with regard to the Air Florida crash at the 14th Street Bridge. At the end of the news conference, they were assigned to man the camera and truck on the bridge. This was about 5:30 p.m. McCargar was to monitor the camera and Hamilton was to sit in the truck which is normally manned by a microwave crew and used to beam a signal to the bureau. The technician on the truck gave Hamilton brief instructions as to how to operate the truck as she had no prior experience doing so, though on a previous occasion she had watched a technician set up the truck. At or about 7 p.m., the work on the wreckage ceased for the day. However, Hamilton did not know how to turn off the equipment in the truck. She telephoned the bureau and received instructions step by step as to how to turn off the truck. This took about an hour. McCargar and Hamilton then returned to the CNN building.

When they arrived at the CNN building, Jim Randall, who was the assignment editor on duty, told them their assignment the next morning was to do a live shot from the bridge at 8:30 a.m. McCargar and Hamilton said neither of them knew how to set up the truck and suggested that Randall get in touch with Maggiolo to see if he could get one of the normally scheduled microwave crews, or at least one person from the crew, to come and set up the truck for them. Tammias said she would be glad to assist in any way but not being a technician she did not feel comfortable trying to set up the truck because she did not know how to do so. Following unsuccessful attempts to reach Maggiolo, Randall called Levy at home and told him that McCargar and Hamilton had been asked to set up the truck the next morning but said they did not know how to do so. Levy asked to speak to them, whereupon both McCargar and Hamilton got on the telephone.

According to Hamilton, Levy asked McCargar if he could set up the truck. McCargar said he did not think he could. Levy said, "You worked on the truck for a few months, George. You know how to do that." McCargar said he did not think that he could because he had not really worked it; he had been a cameraman but he had not actually been the technician on the truck. Levy said, "George, you know how to set up the truck. You can do that and Tammias will shoot." At this point, Hamilton said, "Wait a minute here, two weeks ago I was told by you that I was not supposed to shoot any more and now, why all of a sudden, is it okay for me to

²⁶ A satisfactory rating carried a \$1,000 raise and an above average rating carried a \$1,500 raise.

²⁷ According to Maggiolo, in the past he has on occasion made decisions alone as to the amount of salary adjustment. On other occasions, Levy has made the decision alone and, on some occasions, they have made joint decisions. Employees were supposed to receive a 6-month salary review and a salary adjustment in accordance therewith. The January salary review for Hamilton was the standard 6-month salary review. Levy testified that he thinks the decision as to Hamilton was a joint one.

start shooting." Levy said, "Are you refusing to shoot." Hamilton said, "No, not if you pay me." Levy said, "Are you refusing to shoot, Tammas." Hamilton said, "I'll have to think about it for a minute." Levy said, "Fine, you wait there and I'll be down in five minutes." According to Hamilton, Levy inquired maybe three or four times if she was refusing to shoot and she replied no, not "if you pay me." At one point, Levy responded to Hamilton's statement by saying, "This is not a union shop here. We don't do things that way."²⁸ She denies that she ever flatly refused to shoot the camera but admits that she never unqualifiedly agreed to operate the camera. McCargar did agree to operate the microwave truck without any qualifications.

Hamilton admits that the January 16 incident was not the first time that she had been asked to operate the camera when she was classified as a tape operator. The first time was around the beginning of January 1981. The second time was around the end of February 1981. One of these requests was made by Levy and one by Maggiolo. On each of these occasions, according to her, she responded that she did not want to operate the camera, that she did not feel she was ready. On April 22, 1981, Maggiolo again asked her to operate the camera. As a result of this request, she wrote a letter to Levy dated April 22, 1981, the body of which reads:

Again, I have been asked to shoot. I will start shooting on Monday, April 27, 1981, on one condition, that I am payed [sic] a minimum of grade 8, a cameramans [sic] base salary starting on that date. Also, because evaluations are up and coming, I feel it only proper that my evaluation be based on the cameramans [sic] salary, not the tape deck operators [sic] salary.

On that same date, Levy responded to Hamilton's letter by a memo, the body of which reads:

Pertaining to your memo of April 22, 1981, I want to point out that it is now Mobile Video Services' procedure that an individual permanently assigned a new position (i.e. tape operator to cameraperson) is placed at the starting level for that position. Thus, your "condition" would have been met under existing circumstances.

However, your placing of a "condition" in this matter is not taken in a kind light, and will be considered during our future dealings. May I also point out that you were hired at a starting level of \$4.72 an hour, far above the starting salary of \$4.02 per hour for tape operators. That was of course, due to our knowledge of your existing skills.

In regards to your evaluation, that is based upon your services during the proceeding [sic] six month period, in whatever capacity you filled at the time. That is and will continue to be standard procedure.

²⁸ Hamilton's prehearing affidavit states that Hamilton's reply was "Two weeks ago my salary was reduced \$500 a year so I would not shoot any more. What's the deal?" The affidavit further states, "Levy said, 'Are you refusing to shoot?' I said, 'No, not if I am paid for it.'"

Levy testified that on January 16 he was having dinner when Randall called—one of the few dinners he had with his family since the plane crash. Randall said, "I have a problem." Levy said, "What's the problem?" Randall said, "Hold on." McCargar then came on the phone. They exchanged greetings. McCargar said, "We have a problem tomorrow." Levy said, "What's the problem?" McCargar said, "We have to man the live truck on the 14th Street Bridge." Levy said, "Okay." McCargar said, "I don't know if I'm that familiar with the truck." Levy said, "George, you were the crew chief on the microwave truck for six months. How could you not be familiar with the truck?" McCargar said, "Well." Levy said, "Come on, George, I mean you know the truck. You worked on it for six months. You will run the truck and Tammas will shoot." At that point, Hamilton said, "Two weeks ago you reduced my pay because you didn't want me to shoot. Now, you want me to shoot." Levy said, "I need you to shoot tomorrow." Tammas said, "Will you pay me more?" Levy said, "I need you to shoot tomorrow. Will you shoot tomorrow?" Hamilton said, "Will you pay me more?" Levy said, "Tammas, will you shoot tomorrow. I want you to shoot tomorrow." Hamilton said, "Will you pay me more?" Levy said, "Tammas, are you telling me you are not going to shoot tomorrow?" Tammas said, "Will you pay me more?" Levy said, "Tammas, just tell me yes or no whether you will shoot tomorrow." There was a long pause. Levy said, "Will you shoot, yes or no?" Finally Hamilton said, "No." Levy said, "Wait there, I will be there in five or ten minutes."

Levy then hung up the phone and went immediately to the assignment desk. Hamilton was seated at the desk. According to Levy, he said, "Tammas, can I have your credentials?" She asked why, to which Levy replied, "You are fired." Hamilton again asked why. Levy said, "You have refused to shoot tomorrow. You refused to do your work." Hamilton attempted to say something. Levy said, "I don't want to hear anymore. You said that you don't want to do it." Hamilton then gave him her credentials and he instructed her to leave the building. Levy denies that Hamilton ever said anything to the effect that she needed some time to think about it or to give her a minute to think about it. According to him, the only break in the "whole back-and-forth" was a very long pause before her last response when she directly refused his work instructions.

Levy testified that most of Respondent's employees are hired with little or no experience. They start out in the tape operator position as an entry level position. Within 3 or 4 months, they generally have enough experience to move on to a cameraman position, and, perhaps 3 to 4 months later move to the control room. What usually happens then is they move on to a network position. Inasmuch as Respondent does not pay commensurate wages with the network, employees use their employ with Respondent as a training ground so that a tape operator normally seeks to switch off with the cameraman to gain experience. In some cases, this switching off would be pursuant to a management directive and in other cases it was done harmoniously among the employ-

ees. It would generally start on an assignment that did not require a great deal of skill such as the daily State Department briefing, a static shot on a tripod of the spokesman which does not require portable, off-the-shoulder type work. He agrees that, during the period when Hamilton was employed as a tape operator, on two or three occasions he asked her to switch off on a temporary basis to operate the camera. According to him, following each of these requests, she came in and requested additional compensation for having been the cameraman. On each occasion his response was "we don't do that, that is not the policy of the company."²⁹ Levy further testified that in the spring of 1981 it was Respondent's policy to pay no additional compensation when an individual was asked, on a temporary basis, to perform an assignment other than that for which the employee was classified. According to him, there were no exceptions to that rule. It was in the spring of 1981, according to Levy, that he determined that he wished to reassign Hamilton on a permanent basis to a position as cameraman. Over a period of about a month he had two or three conversations with Hamilton in this regard. He told her she had reached a point where she had learned as much as she could as a tape operator. She initially expressed great doubt about that and was reluctant to accept the reassignment. Levy kept urging her to do so, telling her that he felt she could handle it. She ultimately did and there was an adjustment in her compensation.

2. Conclusions

In view of Maggiolo's admission that he does not recall portions of the conversations with Hamilton as to her salary adjustment and his failure to deny the statements attributed to him, I credit Hamilton's testimony in this regard. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by telling Hamilton that her decrease in pay was motivated by her union activities and that Levy was looking for an excuse to discharge her because of such activities.

The General Counsel and the Charging Party argue that these statements clearly establish unlawful motivation. Although I agree that they do make out a *prima facie* case of unlawful discrimination, Respondent has adduced evidence that Hamilton would have been reassigned and subsequently terminated even if she had not engaged in union activities. Thus, Levy testified, without contradiction, that a White House requirement favoring the limiting of access to the White House to fully credentialed camera crews precipitated the replacement of Williams, who did not possess the necessary credentials, on the mini-11 crew. There is no contention, or evidence, that the selection of McCargar as his replacement was unlawfully motivated. It is undisputed that McCargar was more experienced than Hamilton as a cameraman. Thus, no inference of unlawful motivation can be drawn from his assignment to the position of cameraman

and crew leader, which necessitated downgrading Hamilton to the position of tape operator.

Levy testified, in agreement with Maggiolo, that Hamilton was rated as being on the "needs improvement" level, one of the considerations being the November warning given her with regard to her removal by CNN from the camera in the middle of a live shot because of her uncooperative attitude during an out-of-town assignment. Although the General Counsel argues, based on the Walker memo, that Hamilton did not deserve this reprimand, no one denies that she was in fact removed from the camera in the middle of the shoot.

There is no evidence to indicate that the rating given Hamilton was contrary to Respondent's practice under the circumstances. Also, it is undeniable that it was Respondent's policy that permanent reassignments were accompanied by an appropriate increase or decrease in pay. There is evidence, as set forth above, that employees have received decreases in pay on a downward reassignment and there is no evidence that Respondent ever deviated from this practice. In these circumstances, and in view of Maggiolo's credited testimony that the reassignment and salary adjustment decisions were made by Levy and the fact that the coercive statements were made by Maggiolo whose testimony I credit that he had never discussed Hamilton's union activities with Levy, I find that Respondent has established that Hamilton's reassignment and consequent decrease in pay would have occurred even if she had engaged in union activities. Accordingly, I find that Respondent did not thereby violate Section 8(a)(3) and (1) of the Act.

As to Hamilton's discharge, the General Counsel's and the Charging Party's positions are based on arguments as to indicia of unlawful motivation which I have rejected above, and additionally, on timing, Respondent's knowledge of Hamilton's union activities, and the alleged pretextual and shifting nature of the reasons asserted for her discharge, I conclude that Respondent did not assert shifting reasons. Levy's testimony that he was irritated because the telephone call interrupted his dinner and evening at home and that he felt that Hamilton was the principal cause of the reluctance to accept the assignment is not inconsistent with Respondent's contention that she was discharged because she refused to comply with a proper work order.

Thus, Levy testified that Hamilton was discharged because of the January 16 telephone incidents. According to him, first it evinced that she thought nothing of disturbing him at home on a Saturday when she should have performed the assignment and then raised the pay issue on Monday; and, more importantly, she placed a condition on carrying out her assignment. Further, contrary to the General Counsel, I do not find it significant that Levy, in his prehearing affidavit, stated that Hamilton telephoned him when actually it was Jim Randall, the assignment editor, who initiated the call. It is clear from the undisputed testimony that the call was initiated because McCargar and Hamilton said they could not set up the truck and suggested that Randall contact Respondent to get another employee assigned to the crew.

²⁹ Levy also referred to the employee handbook, which states as to work assignments, "You are expected to work on any assignment given to you by your assignment desk, production director or unit coordinator. The company reserves the right to reassign modify or reschedule an employee and/or the work assignment at any time."

I also reject the General Counsel's argument that Hamilton did not actually refuse to operate the camera. It is apparent, even from Hamilton's account of the conversation, that she was refusing to operate the camera if she did not receive additional pay. It is undisputed that it was not Respondent's policy to adjust pay for temporary out-of-classification assignments. It is also undisputed that previously, prior to her union activities, Hamilton had placed an additional-pay condition upon her agreement to operate the camera and that Levy had responded negatively to the placing of the condition.

In the circumstances, I do not find it unreasonable that Levy considered Hamilton's refusal to operate the camera as a serious offense and, in the absence of other convincing evidence as to unlawful motivation, I conclude that Respondent has met its burden of establishing that Hamilton would have been discharged even if she had not engaged in union activities. The General Counsel has failed to rebut this. Accordingly, I find that, by discharging Hamilton, Respondent has not violated Section 8(a)(3) and (1) of the Act. Further, since no evidence was adduced in support thereof, I find that Respondent has not violated Section 8(a)(1) of the Act as alleged in subparagraph 5(d) of the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act by telling an employee that she had been demoted with an accompanying decrease in pay and that Respondent was seeking an excuse to discharge her, all because of her union activities.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The evidence does not establish that Respondent unlawfully discriminated against employees Patrick Anderson and Tammis Hamilton in violation of Section 8(a)(3) and (1) of the Act, nor that Respondent has engaged in any unfair labor practices in violation of Section 8(a)(1) of the Act except as set forth above.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action in order to effectuate the purposes of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this³⁰ proceeding, and pursuant to Section 10(c) of the Act, I hereby recommend the following:

ORDER³¹

The Respondent, Mobile Video Services, Ltd., Washington, D.C., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees they were demoted with an accompanying decrease in pay because of their union activities.

(b) Telling employees that it is seeking an excuse to discharge them because of their union activities.

(c) In any related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its facility in Washington, D.C., copies of the attached notice marked "Appendix B."³² Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations not found herein.

³⁰ The motions of counsel for Respondent and counsel for the General Counsel to correct the official transcript herein are granted and the official transcript herein is corrected as set forth in Appendix A [omitted from publication].

³¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

³² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."